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Nos. 96-552 and 96-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners

v.

BETTY-LOUISE FELTON, *et al.*

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,
Petitioners

v.

BETTY-LOUISE FELTON, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Knights of Columbus submits this brief amicus curiae in support of the petitioners. All parties to these cases have given their written consent to the participation of the Knights of Columbus, and copies of their written consent have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

The Knights of Columbus is a charitable Catholic family fraternal organization of close to 1.6 million members and their families, totaling nearly six million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with some 11,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Philippines and several other countries. The Knights of Columbus is the largest lay organization in the Roman Catholic Church.

Since its founding, the Knights of Columbus has been dedicated to several purposes: (i) rendering aid and assistance to its sick, needy and disabled members and their families; (ii) promoting social and intellectual discourse among its members and their families; (iii) promoting and conducting educational, charitable, religious, social welfare, war relief and public relief work; and (iv) maintaining a life insurance program for the benefit of its members, their beneficiaries and their families. Last year alone, the Knights contributed more than $105 million to charitable causes and provided roughly 50 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the family and the Church, including issues involving religious liberty, church-state relations and parochial schools. For example, the Knights underwrote the litigation in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). The Knights of Columbus is a strong supporter of Catholic education; and many of its members send their children to parochial schools. The Knights of Columbus therefore has a strong interest in the Establishment Clause issues raised in these cases and in the overruling of *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

STATEMENT OF THE CASE

The Knights of Columbus adopts the statement of the case set forth in the brief of Petitioners Rachel Agostini, *et al.*, and wishes simply to underscore the following:

1. Title I remedial services are available to all children who are economically and educationally deprived, 20 U.S.C. §§ 6313, 6315(b), whether they attend public or parochial schools.

2. Title I funds in New York are used to teach remedial reading, math and English as a second language. No Title I funds are given directly to parochial schools.

3. Title I funds, which must be "secular, neutral, and nonideological," may only supplement, and not supplant, the services otherwise provided by the parochial school. 20 U.S.C. §§ 6322(b), 6321(a)(2).

4. Since this Court's decision in *Aguilar* v. *Felton*, *supra*, Title I services have been provided in alternative ways, including vans parked near parochial schools. These alternative methods already have cost New York more than $100 million.

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from acting for certain purposes. The government may not purposefully suppress speech, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), or purposefully restrict the free exercise of religion, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 523 (1993), or purposefully advance "a religious cause." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2521-22 (1995).[1]

This Court consistently has held, however, that the unintended, incidental effects of governmental actions do

[1] The government may, of course, "act with the proper purpose of lifting a regulation that burdens the exercise of religion." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 328 (1987).

not violate the First Amendment. The government's actions may effectively burden speech. *Ward*, 491 U.S. at 791. Where unconnected to any other constitutional right, such as the right of parents to direct the education of their children, the government's actions may effectively restrict the exercise of religion. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). The Establishment Clause similarly does not prohibit unintended, incidental benefits to religious institutions. *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993). This Court has long held, for example, that parochial schools could benefit from "a general program under which [the state] pays the [bus] fares of pupils attending public and other schools." *Everson v. Board of Education*, 330 U.S. 1, 17 (1947). Because the class of beneficiaries was defined by the statute neutrally and without reference to religion, the fact that parochial schools benefited incidentally was not enough to violate the Establishment Clause. The government's purpose was to benefit all schoolchildren, and it could only satisfy that purpose by paying the bus fares of all schoolchildren, including parochial schoolchildren. The inevitable, foreseeable but unintended consequence of the government's purpose was to aid parochial schools, and the First Amendment was not violated.

In Establishment Clause cases, however, this basic First Amendment principle—that the unintended, incidental effects of governmental actions do not violate the Constitution—has had only inconstant application. This is ironic because the case for finding a constitutional violation among the incidental and unintended effects of a statute is even weaker under the Establishment Clause than under the Free Speech or Free Exercise Clauses. While the text of the First Amendment is consistent with a concern for incidental and unintended abridgment of speech or free exercise rights, an incidental and unintentional establishment of religion is an oxymoron. *Aguilar* nonetheless subjects the unintended, incidental effects of

governmental actions to a confusing and severe set of doctrines for which there is no parallel in free speech and free exercise cases. There is no sensible constitutional reason for treating unintended consequences under the Establishment Clause more severely than those under the Free Speech and Free Exercise Clauses. If the First Amendment does not prohibit truly incidental suppressions of speech or truly incidental restrictions of religious activity, it should not be read to prohibit truly incidental aid to religious activity.

The provision of Title I services on the premises of parochial schools is a case of unintended, incidental effects. The Title I program is constitutional, as this Court already has held. *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *modified*, 422 U.S. 1004 (1975). Title I services are given to a broad, general class of beneficiaries—poor, remedial students—that is defined without reference to religion. Those services are purely secular and are given directly to the schoolchildren, not to the parochial schools. And, by statutory requirement, Title I can only supplement, not supplant, the curriculum provided by parochial schools. Any unintended, incidental benefit the parochial schools might gain from the provision of Title I services in their classrooms does not violate the Constitution.

ARGUMENT

In deciding First Amendment cases, whether under the Free Speech, Free Exercise or Establishment Clauses, this Court has focused on the government's purpose in acting; and, other than in *Aguilar*, it has not struck down a statute or program solely because of its unintended, incidental effects. There are many searching judicial devices for determining whether an effect is truly incidental; but that has been the crucial inquiry. A common principle of First Amendment cases is thus that the unintended, inci-

dental effects of governmental actions do not violate the Constitution. *Aguilar* fails to respect that common principle, and should be overruled.

I. UNINTENDED, INCIDENTAL EFFECTS OF GOVERNMENTAL ACTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

From *Everson* to *Rosenberger*, the government's purpose in acting has been the central focus of Establishment Clause inquiry. The Establishment Clause requires courts to "inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Rosenberger*, 115 S. Ct. at 2521.

To ensure that certain effects of governmental action are truly incidental, and not the result of "some ingenious device [adopted] with the purpose of aiding a religious cause," *id.*, at 2522, this Court has employed two principal devices. First, this Court has examined whether the class of beneficiaries is defined in a neutral way, without regard to religion. Second, this Court has examined whether the benefit flows to religious institutions because of the genuinely independent choices of private individuals. Neither technique of judicial inquiry is itself dispositive; both are meant to help determine whether an effect is truly incidental and thus whether the government has acted with a constitutional purpose.

A. Neutrality.

The text of a statute is the best expression of its purpose. When a statute defines a class of beneficiaries, the government's purpose is plainly to benefit that class as a class. This Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenu-

ated financial benefit." *Zobrest*, 509 U.S. at 8. See *Rosenberger*, 115 S. Ct. at 2521-22; *Witters* v. *Washington Dep't of Services for Blind*, 474 U.S. 481, 487-88 (1986); *Mueller* v. *Allen*, 463 U.S. 388, 397-400 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274-75 (1981); *Walz* v. *Tax Com. of New York*, 397 U.S. 664, 673 (1970); *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); *Everson*, 330 U.S. 1, 17.[2]

"The purpose, or justification, of a regulation will often be evident on its face." *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994). But not always. This is the problem of "sham" purposes.[3] When examining a statute, courts insist on more than a facial neutrality; substantive neutrality is required as well. *Board of Ed. of Kiyras Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct. 2481, 2490 (1994); *Hialeah*, 508 U.S. at 533-34. A truly neutral class of beneficiaries is the strongest evidence of the government's constitutional purpose.

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[2] This Court's emphasis on content-neutral regulations in free speech cases is analogous to the requirement of neutrality in Establishment Clause cases. If a statute limiting speech is written in terms of the content of speech, then the conclusion is almost inescapable that its purpose is to limit what can be said. See *Turner Broadcasting Sys.*, 114 S. Ct. at 2459; *Schacht* v. *United States*, 398 U.S. 58 (1970). A focus on whether a statute is by its terms "content-neutral" is an opening effort to scrutinize the words of the statute to make sense of the government's object or purpose in legislating. Similarly, in the free exercise context, there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Hialeah*, 508 U.S. at 533-34.

[3] See *Wallace* v. *Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("a law will not pass constitutional muster if the . . . purpose articulated by the legislature is merely a 'sham' "); *Arcara* v. *Cloud Books Inc.*, 478 U.S. 697, 707 n.4 (1986) (O'Connor, J., concurring) (calling them "pretext[s]").

B. Independence.

If a religious institution benefits from governmental aid solely because of the "genuinely independent and private choices" of those actually receiving the aid, *Witters*, 474 U.S. at 487, the government is unlikely to harbor the hidden purpose of advancing religion. The fact that aid is given directly to students, parents or some other third party is thus another prominent indication that an indirect benefit flowing to parochial schools is truly an unintended, incidental effect, and not the government's hidden purpose. See, *e.g.*, *Rosenberger*, 115 S. Ct. at 2523 (payment made to third party); *Zobrest*, 509 U.S. at 9 (aid given directly to family); *Witters*, 474 U.S. at 487 (aid given directly to student); *Mueller*, 463 U.S. 401 (tax deduction given to parents).

Courts often test the government's purpose by examining what the statute actually permits or requires. "[T]he effect of a law in its real operation is strong evidence of its object." *Hialeah*, 508 U.S. at 535. Certain kinds of direct and substantial governmental aid to parochial schools, for example, have sometimes been considered evidence of a purpose to advance religion. In some cases, "direct grants of governmental aid" that relieve parochial schools of "costs they otherwise would have borne in educating their students" have been found unconstitutional. *Zobrest*, 509 U.S. at 12. Where, for example, the government "tak[es] over a substantial portion of [a parochial school's] responsibility for teaching secular subjects"—including courses in art, music and physical education—the government has provided what amounts to an unconstitutional "direct cash subsidy to the religious school." *Ibid.* (citing *Sch. Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985)). And the same might be true if the government were to directly give such schools "massive aid" in the form of teaching material and equipment. *Id.* (citing *Meek* v. *Pittenger*, 421 U.S. 349 (1975)).

C. The Provision of Title I Remedial Services In Parochial School Classrooms Is Constitutional.

The provision of Title I services to poor, remedial students on the premises of parochial schools satisfies the Establishment Clause because it is a neutral, independent grant of aid to schoolchildren. Under Title I, all schoolchildren who need help with math and reading are given instruction in those subjects from public employees, and by statute that instruction cannot replace what is provided in the student's parochial school. Any attenuated benefit to the parochial schools from the provision of Title I services in their classrooms is unintended, incidental and so perfectly constitutional. That should end the matter.[4]

II. ALONE AMONG FIRST AMENDMENT CASES, *AGUILAR* STRUCK DOWN A LEGISLATIVE PROGRAM BECAUSE OF ITS UNINTENDED, INCIDENTAL EFFECTS.

Aguilar stands alone, in defiance of the basic First Amendment principle that unintended, incidental effects do not violate the Constitution. Instead of employing that basic principle, which the Establishment Clause shares with the Free Speech and Free Exercise Clauses, *Aguilar* went its own way; it adopted what might be called a constitutional consequentialism, in which the incidental effects of governmental actions are seen as themselves posing independent constitutional problems.

Effects resonate. They are never neutral. Consequentialists are thus forever facing how they might, in a principled way, separate constitutional effects from unconstitutional ones. Clearly, not all governmental actions that effectively aid religion are unconstitutional. *Zobrest*,

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[4] There can be no endorsement of religion where a governmental action provides only an incidental benefit to religion. No one endorses what is truly unintended and incidental. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2447-48 (1995) (plurality).

509 U.S. at 8. State provision of police and fire protection effectively aids religion, yet no one argues that they are unconstitutional. *Everson*, 330 U.S. 1. Tax exempt status for churches effectively aids religion. *Walz*, 397 U.S. 664. Tax deductions for parochial school tuitions, transportation and textbooks effectively aid religion. *Mueller*, 463 U.S. 388. State-paid interpreters and state-paid printing of religious material effectively aid religion, too. *Zobrest*, 509 U.S. 1; *Rosenberger*, 115 S. Ct. 2510. And yet these and other unintended, incidental effects of governmental actions are plainly constitutional. *Aguilar*'s consequentialism cannot adequately explain those cases; and its logic is flatly inconsistent with them.

A. Unintended, Incidental Effects in Free Speech and Free Exercise Cases.

This Court's free speech and free exercise precedents hold that the unintended, incidental effects of governmental actions do not violate the Constitution. The same should be true in Establishment Clause cases.

1. *Free Speech.*

In free speech cases, the "government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. In *Ward*, New York City passed regulations designed to protect residents near the band shell in Central Park from excessive noise; those regulations obviously and inevitably had a speech-limiting effect on those performing in the band shell. This Court held the regulations constitutional, as incidental restrictions of speech. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citations omitted). See *Turner Broadcasting Sys.*, 114 S. Ct. at 2469; *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

Ward also held that the government's incidental effect on speech need not be the least restrictive possible. While it must be "narrowly tailored to serve the government's legitimate content-neutral interests," a time, place or manner regulation "need not be the least-restrictive or least-intrusive means of doing so." *Ward*, 491 U.S. at 798-99. The less restrictive means test is meant to make sense of the government's purpose in acting—by asking if that purpose would be more (or less) complete if the speech-limiting effects did not attend it; and that sort of test does not require the least possible effect of governmental action on speech.

2. *Free Exercise.*

In free exercise cases, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Hialeah*, 508 U.S. at 523. As with other First Amendment provisions, the central concern of the Free Exercise Clause is the government's purpose in acting. The point was made dramatically in *Employment Div.* v. *Smith*, 494 U.S. 872. Oregon criminalized the use of various drugs, including peyote. Smith, a member of the Native American Church, smoked peyote at one of the Church's religious ceremonies. This Court upheld Oregon's criminal law as imposing only an "incidental effect" on Smith's religious activity, even though it burdened the exercise of his religion: "if prohibiting the exercise of religion . . . is not the object of [a general law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not offended." 494 U.S. at 878.

Whether or not one agrees with the holding of *Smith*, and many do not,[5] its logic is clear: where no other con-

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[5] The common object of the Religion Clauses is religious liberty, and there is thus good reason to scrutinize incidental burdens on religious exercise more severely than incidental aid to religious institutions. Taken together, however, *Smith* and *Aguilar* do just

stitutional right is implicated, the First Amendment is not violated so long as the object or purpose of a generally applicable law is constitutional—even if the unintended effect of that law is incidentally to burden one's religious activity. The Court's focus on the government's purpose is evident from its care in noting that there had been no suggestion by either party that the government was seeking to satisfy any hidden unconstitutional purpose through the application of the law. 494 U.S. at 882. The *Smith* court also noted that the government would violate the Free Exercise Clause "if it sought to ban acts or abstentions only when they are engaged in for religious reasons or only because of the religious beliefs they display." *Id.* at 877. In such cases, one could only conclude that the government's purpose was to restrict religious activity.

Similarly, in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988), the Court held that the government's construction of a road through a national forest that traditionally had been used by American Indian tribes for religious activity did not violate the Free Exercise Clause. This Court acknowledged that the road's construction "could have devastating effects on traditional Indian religious practices," but considered these to be "incidental effects." *Id.* at 451. The Court stressed, however, that "the Government has taken numerous steps . . . to minimize the impact that construction of the G-O road

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the opposite—and religious liberty loses twice. For its part, *Smith* examined only the formal neutrality of Oregon's statute, which was neutral only in the sense that laws forbidding people to sleep under bridges are formally neutral. Oregon refused to grant an exemption for the sacramental use of peyote (or, in another era perhaps, sacramental wine) for no articulable reason; its religion-neutral interests would have been served as equally with such an exemption as without. A governmental action that "visits gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Hialeah*, 508 U.S. at 538 (citation omitted).

will have on the Indians' religious activity." *Id.* at 454. The government sought to satisfy its purpose with a minimal effect on Indian religious practices. That was good evidence that the government's purpose was constitutional and that its effects were truly unintended and incidental.

B. *Aguilar* and the False Problem of Unintended, Incidental Effects in Establishment Clause Cases.

The fundamental mistake of *Aguilar* is that it sees a constitutional problem where none exists. The unintended, incidental effects of governmental actions—like those produced by the provision of Title I services in parochial school classrooms—do not violate the Establishment Clause, even if they effectively advance religion. Acknowledging Title I's "well-intentioned efforts," *Aguilar* nonetheless built a structure of doctrines because it feared the mere possibility of an unintended consequence: "the infiltration of religious thought" in Title I instruction. 473 U.S. at 413. But the Constitution simply does not prohibit the government from effectively aiding religion, any more than it prohibits the government from effectively limiting speech.

The various and novel aspects of *Aguilar*—political divisiveness, administrative entanglement, the "excessive entanglement" produced by the "ongoing inspection" of Title I's public employees—are alternative devices for preventing the government from effectively aiding religion. *Ibid.* at 412-14. Those devices (or something like them) will last as long as the Court considers its task under the Establishment Clause to be weighing up the good and bad states of affairs that effectively aiding religion might be said to contain.

Aguilar's doctrine of "excessive entanglement" represents the highwater mark of a misguided focus on incidental and unintended effects. It has been the consequentialist trump card. Of course, "excessive entangle-

ment" has trumping power only because, as Chief Justice Rehnquist has pointed out repeatedly, it is a "Catch 22" argument: the Constitution will not allow various forms of unintended, incidental aid to parochial schools without "ongoing supervision" of their use; and the intense scrutiny of this required supervision itself violates the Constitution. *Wallace* v. *Jaffree*, 472 U.S. 38, 109-110 (1984) (Rehnquist, J., dissenting). Under *Aguilar*, the Constitution requires what the Constitution forbids. This is the *reductio ad absurdum* of a misguided focus on unintended effects. To avoid the constitutional problems created by conveying unintended benefits one must engage in extensive monitoring (after all, unintended and incidental benefits are much more difficult to detect than overt and substantial ones), only to be told that even if the monitoring succeeds, the program will be declared unconstitutional on the entanglement prong.

The real problem of *Aguilar*, however, is not its bizarre doctrinal innovations, but its mistaken sense that such devices are needed. They are not. The unintended, incidental effects of governmental action do not violate the Constitution.

III. *Aguilar's* On-Premises/Off-Premises Distinction Has No Constitutional Significance and Should Be Overruled.

The Constitution is not a parking code. And yet, under *Aguilar*, federal courts unanimously have held that the government may provide Title I services to parochial school students in vans parked just over the fringe of parochial school property, but not on the school's property or in its own classrooms. See *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ.* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991). At the barest minimum, this Court should end that sort of

line-drawing. Requiring the provision of Title I services off the premises of parochial schools is costly, disruptive and pointless. Indeed, "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest*, 509 U.S. at 13. This Court already has approved the provision of health services, diagnostic speech and hearing services and sign-language interpreters on the premises of parochial schools. *Id.* at n.10 (citations omitted). If public employees may constitutionally translate the homily during Mass at Salpointe Catholic High School for a parochial school student, *id.* at 19 (Blackmun, J., dissenting), they surely can teach remedial math and reading to Title I students in their own classrooms.

CONCLUSION

Aguilar should be overruled. And in doing so, this Court should make clear that, as with other provisions of the First Amendment, the unintended, incidental effect of advancing religion does not violate the Establishment Clause. The judgment of the Court of Appeals should be reversed and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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